LATHAM & WATKINS LLP
Perry J. Viscounty (Bar No. 132143)
*perry.viscounty@lw.com*
140 Scott Drive
Menlo Park, CA 94025
(650) 328-4600 / (650) 463-2600 Fax

LATHAM & WATKINS LLP
Jennifer L. Barry (Bar No. 228066)
*jennifer.barry@lw.com*
12670 High Bluff Drive
San Diego, CA 92130
(858) 523-5400 / (858) 523-5450 Fax

Attorneys for Plaintiff
craigslist, Inc.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CRAIGSLIST, INC., a Delaware corporation,

Plaintiff,

v.

3TAPS, INC., a Delaware corporation; PADMAPPER, INC., a Delaware corporation; DISCOVER HOME NETWORK, INC., a Delaware corporation d/b/a LOVELY; HARD YAKA, INC., a Delaware corporation; BRIAN R. NIESSEN, an individual; ROBERT G. KIDD, an individual; and Does 1 through 25, inclusive,

Defendants.

CASE NO. CV 12-03816 CRB

**(1) PLAINTIFF CRAIGSLIST, INC.'S CONSOLIDATED REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT**

**(2) DECLARATION OF ROBERT J. ELLISON**

**(3) EXHIBITS A - H**

**(4) DECLARATION OF JENNIFER L. BARRY**

Hearing Date: June 12, 2015
Time: 10:00 a.m.
Courtroom: 6
Judge: Hon. Charles Breyer

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Page(s)**

## CASES

**RULES**



**OTHER AUTHORITIES**

## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

Neither 3taps, Inc., Robert G. Kidd and Hard Yaka, Inc. (the "3taps Defendants") nor PadMapper, Inc. ("PadMapper") (together, "Defendants") have advanced evidence or argument sufficient to rebut the *extremely liberal presumption* in favor of granting craigslist, Inc. ("craigslist") leave to amend its operative complaint under Rule 15. Indeed, craigslist's Motion should be granted for at least the following reasons:

- craigslist's narrow proposed amendments are of the very sort that Rule 15 is designed to permit—*i.e.*, they ensure that the operative complaint reflects the pertinent facts as they were learned in discovery and includes new claims arising from those facts so that this case will be tried on the merits. Indeed, amendments are often allowed *during* trial to ensure adjudication on the merits (*See Howey v. United States*, 481 F.2d 1187, 1191 (9th Cir. 1973)) and, here, no trial date has even been set.
- Defendants failed to present any credible evidence of bad faith. Instead, Defendants offer unsupported accusations that craigslist acted with "indications of bad faith" and intentionally delayed requesting leave to amend to achieve some supposed tactical advantage by depriving Defendants of the opportunity to take discovery on craigslist's new claims. Defendants' position is unsupported by the facts and, in any event, wholly inadequate to prevail under controlling law.
- Defendants cannot credibly profess prejudice (the "touchstone of the inquiry" that "carries the greatest weight"[1]) because the proposed new claims merely are derivative of claims in the operative Complaint, and thus require no additional discovery. If the Court believes that limited discovery is reasonably necessary for Defendants to defend against craigslist's new claims, then craigslist will, of course, provide it.
- Through enormous time, expense and effort, craigslist recently discovered (during depositions in March and April and Defendants' written discovery responses and

[1] *See Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

document productions) new evidence, and moved promptly for leave to amend.

- Defendants fail to articulate how any of the proposed amendments would be "futile." To the contrary, craigslist's proposed amendments satisfy the relevant pleading standard, are well grounded in the applicable law, and are crucial to a fair and full determination of this dispute on the merits and to protect craigslist's users from Defendants' egregious and unlawful conduct.

craigslist therefore respectfully requests that the Court grant this Motion and allow craigslist to file the Third Amended Complaint ("TAC").

## II. ARGUMENT

### A. Defendants Present No Credible Evidence of Bad Faith.

craigslist in no way engaged in bad faith. Recognizing the gravity of bad faith accusations, courts generally require a party claiming bad faith to demonstrate that the moving party "act[ed] with intent to deceive, harass, mislead, delay, or disrupt." *Mansfield v. Jones-Pfaff*, No. C14-0948JLR, 2014 U.S. Dist. LEXIS 173772, at *26-27 (W.D. Wash. Dec. 16, 2014), *citing Leon v. IDX Sys. Corp.*, 464 F.3d 951, 961 (9th Cir. 2006). Bad faith "implies the conscious doing of a wrong because of ***dishonest purpose or moral obliquity***. . . . [I]t contemplates a state of mind affirmatively operating with ***furtive design or ill will***." *United States v. Manchester Farming P'ship*, 315 F.3d 1176, 1185 (9th Cir. 2003) (emphasis added); *see also DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987) ("Since there is no evidence in the record which would indicate a wrongful motive, there is no cause to uphold the denial of leave to amend on the basis of bad faith.") Here, Defendants incorrectly accuse craigslist of engaging in bad faith in connection with its proposed Third Amended Complaint. To get there, Defendants rely on factual misrepresentations and unsupported "suggestions" that, even if true (they are not), would still fall far short of "bad faith" under the law of this Circuit.

***First***, the 3taps Defendants contend that "craigslist's counsel notified Defendants of craigslist's intent to file an amended complaint on March 19, but refused to disclose the proposed amendments." (3taps Opp. at 1.) This is a grossly misleading characterization of the facts. In reality, on March 17, counsel for the 3taps Defendants called craigslist's counsel requesting, for

the first time, that craigslist stipulate to the 3taps Defendants' filing of a Second Amended Answer. (Declaration of Robert J. Ellison ("Ellison Decl."), ¶ 2.) This issue was revisited following a discovery hearing on March 19, at a meet and confer among counsel about unrelated discovery issues, during which counsel briefly discussed whether craigslist would so stipulate. (Declaration of Jennifer L. Barry ("Barry Decl."), ¶ 3.) At that time, craigslist's counsel stated that craigslist might also move to amend its complaint, but first needed to conduct additional discovery and to determine the scope of its potential amendments. (*Id.*) craigslist's counsel suggested a global stipulation regarding the 3taps Defendants' and craigslist's potential amendments once craigslist determined how it proposed to amend its complaint. (*Id.*) The 3taps Defendants declined to stipulate and filed their motion for leave to file an amended answer, which craigslist did not oppose. (*Id.*) After taking additional discovery, the precise nature of craigslist's proposed amendments crystallized and, at that time, craigslist provided Defendants with the details of the proposed amendments and sought a stipulation for the filing of the TAC. (Ellison Decl., ¶ 3.) Defendants declined. (*Id.*, ¶ 5.) For the 3taps Defendants to represent that craigslist's counsel "refused to disclose" its amendments is baseless and completely misleading. The fact that craigslist did not describe any proposed amendments on March 19 is simply because the specifics of any potential amendments had not yet been finalized. In short, craigslist did not "refuse" anything, and it certainly did not act in bad faith.

***Second***, Defendants argue that craigslist's "decision" to "wait" to file its Motion until a week before the close of fact discovery "suggests" a tactical delay akin to bad faith. (3taps Opp. at 1; PadMapper Opp. at p. 5.) Again, this baseless "suggestion" ignores the facts. As craigslist informed Defendants on March 19, craigslist did not file at that time because it needed additional discovery. Indeed, 18 depositions were taken by the parties and Defendants served eight written discovery responses *after* March 19. (Ellison Decl., ¶ 3.) As explained to Defendants, this extensive discovery was used to inform and finalize craigslist's amendments. Defendants' assertions that this so-called delay was a "tactical decision" to prevent them from taking additional discovery—and anything other than a product of the discovery schedule agreed upon

by the parties—is simply inaccurate.[2]

***Third***, Defendants further attempt to concoct "strong" (3taps Opp. at p. 1) or "clear indications" (PadMapper Opp. at p. 1) of bad faith where none exist, by pointing to craigslist's proposed amendment to narrow and clarify its theory of trespass harm, and craigslist's alleged "failure to acknowledge the proposed amendment" in its motion. Far from a "surreptitious attempt to belatedly amend its trespass claim" or a "last-ditch effort" to avoid dismissal at summary judgment (3taps Opp. at p. 1), craigslist's slight revision of Paragraph 193 of the Second Amended Complaint ("SAC") simply clarifies the specific sub-species of trespass harm that craigslist is alleging (which sub-species was already encompassed by ¶ 193 of the SAC), thereby narrowing the trespass claim in accordance with the plain language of Judge Corley's April 2, 2015 Order (Dkt. No. 223).

Indeed, Defendants' feigned surprise regarding craigslist's trespass theory of harm—much less their accusations of bad faith—are incredible in light of the parties' weeks-long discovery efforts and several hundred attorney hours spent litigating the issue of trespass harm. To be clear, craigslist asserted this specific theory of trespass harm at least as far back as November 12, 2014. (*See* Dkt. No. 148, at 34-35 ("[I]f scraping were permitted to proliferate, then craigslist's servers would reach a point where they are so overburdened and slow as to be beyond the point of usefulness to support its website.") (citing *eBay, Inc. v. Bidder's Edge, Inc.* 100 F. Supp. 2d 1058, 1071-72 (N.D. Cal. 2000) and *Register.com v. Verio, Inc.*, 356 F.3d 393, 404 (2nd Cir. 2004)).[3] In November 2014, Defendants had not yet noticed a single deposition (they subsequently took 10) and were far from done propounding written discovery (they subsequently served on craigslist a combined 98 requests for production, 46 interrogatories, and 52 requests for admission).

Moreover, on April 2, 2015, after the parties engaged in extensive briefing and oral

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[2] PadMapper's argument that craigslist filed the motion to "prolong the litigation" is equally meritless. As explained in Section II.B.1, the TAC would change nothing about the schedule because additional discovery is unnecessary.

[3] PadMapper incorrectly asserts that craigslist asserted this theory of harm for the first time *after* Judge Corley's April 2, 2015 Order. (PadMapper Opp. at p. 4.)

argument regarding the very issue of trespass harm, Judge Corley expressly recognized that craigslist was pursuing a trespass theory of harm based on the likelihood of a pile-on effect should a court endorse Defendants' scraping:

> craigslist intends to prove that Defendants' conduct has a 'pile-on effect' –i.e., the idea that Defendants' conduct encourages further scraping, which threatens to interfere with the intended function of its computer system. In other words, even if, as conceded . . ., Defendants' conduct has not thus far interfered with the efficient function of craigslist's computer system, allowing the conduct to continue will encourage others to engage in similar conduct which will eventually have a detrimental effect on the system. *See Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1353-54 (2003).

(Dkt. No. 223, at 2.) Judge Corley then ordered craigslist to produce "all documents on which it may rely to support its theories of harm upon which its trespass claim is based and shall identify any witness who might testify in support of these facts." (*Id.*) In addition to the evidence of harm it had already produced, craigslist subsequently identified these witnesses (who had not yet been deposed) and produced substantial evidence that will serve as the basis for its contention that Defendants' conduct constitutes an unlawful trespass. (Ellison Decl., ¶ 4].)

Defendants had ample opportunity to and did, in fact, question craigslist's witnesses about its trespass harm theory and evidence. Indeed, Defendants took *nine* depositions of craigslist witnesses weeks after craigslist's productions following Judge Corley's April 2 Order. craigslist's Chief Executive Officer Jim Buckmaster's deposition testimony is but one example of the extensive testimony elicited by Defendants on the issue of craigslist's trespass harm:

> 3taps is disproportionately using some aspects of our site; for instance, the segments of our site that protect our users' contact information. 3taps' activity . . ., at times, constitutes 30 percent of the activity on those resources of our site. So, currently, we have a situation where this resource on our site, out of every 100 requests, 70 are from our tens of millions of users, and 30 are from 3Taps. If it's okay for 3taps to do it, it's okay for everyone to do it. So let's say, there's 1,000 3taps. So that's 30,000 units of activity from the 3taps, et al., and 70 units from our tens of millions of users. What do you think about that? Does that sound reasonable to you? Now, what are our users supposed to think about that scale of abuse? And this is a party that's been told every which way to stop doing what they're doing.

(Ellison Decl., ¶ 7, Ex. B, pp. 141-142.)

There is nothing even remotely approaching evidence of "bad faith" in craigslist's

proposed amendment to Paragraph 193, which is simply intended to clarify the specific theory of trespass harm, consistent with Judge Corley's order. Nor, as discussed below, can Defendants credibly claim any potential for prejudice arising from that particular amendment, in light of the ample notice and opportunities for discovery regarding the "pile-on" theory of trespass harm.

In sum, there are no "indications of bad faith" by craigslist (let alone actual bad faith) and Defendants' counterfactual accusations must be rejected.[4]

**B. Defendants Fail to Demonstrate They Will Suffer Any Legally Cognizable Prejudice by the Proposed Amendments**

Defendants' unfounded allegations of bad faith appear to be intended to obfuscate the most important factor in the analysis: whether any legally cognizable prejudice to Defendants would result from the Court granting leave to amend. At bottom, Defendants' allegations of prejudice are premised on the unsupported argument that they need additional discovery on craigslist's proposed amendments. This is simply not the case—nor, if it was, would that be sufficient to overcome Rule 15(a)'s presumption in favor of leave to amend.

1. **Additional Discovery Is Unnecessary**

Defendants fail to identify *any additional discovery* that they reasonably need to defend against craigslist's claims (because they need none).[5] *See Giuliano v. SanDisk Corp.*, No: C 10-02787 SBA, 2014 U.S. Dist. LEXIS 132163, at *19 (N.D. Cal. Sept. 19, 2014) (finding no

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[4] PadMapper also argues that craigslist's proposed new claims are asserted only "to try to get around deficiencies identified in the course of discovery." (PadMapper Opp. at 2.) As noted in Sections II.A, II.C and II.D, however, craigslist's proposed claims against PadMapper are viable and based on newly discovered evidence. These are precisely the types of amendments Rule 15 is designed to permit.

[5] For example, Defendants argue that they would need additional discovery if craigslist is permitted to amend Paragraph 193 of the SAC (regarding trespass harm). As explained above in section II.A, craigslist's modest revision would in no way enlarge or change the scope of the issues and Defendants have been on notice of craigslist's theory of trespass harm since at least November 2014. *See Phoenix Solutions, Inc. v. Sony Electronics, Inc.*, 637 F. Supp. 2d 683, 691 (N.D. Cal. 2009) ("When the defendant was on notice of the additional proposed factual allegations, the defendant is not seriously prejudiced by the amendment."). For the same reasons, the potential areas of discovery that the 3taps Defendants purportedly "would have" sought to "undermine craigslist's theory that Defendants' conduct will encourage others to unlawfully access craigslist's website" (3taps Opp. at 10) are unpersuasive and insufficient to warrant denial of leave to amend.

prejudice where "SanDisk has not shown that the 4AC significantly alters the nature of this litigation. Indeed, the issues raised in the 4AC are substantially related to the issues contained in the TAC."); *Howey*, 481 F.2d at 1191 (finding no prejudice even where amendment was sought five years after filing of initial complaint and trial had begun because the defendant's "preparation of a defense against [existing] claims necessarily included a factual and legal investigation covering the same area which would be explored . . . in defending against the [new claims]"). This failure is dispositive.[6]

**2. The Possibility For Additional Discovery Alone Does Not Prejudice Defendants**

Even if the proposed amendments warranted additional discovery by Defendants (they do not), it is well-established that such a possibility, alone, is insufficient to demonstrate the "substantial" prejudice necessary to overcome the presumption in favor of granting leave to amend: "By definition any amendment worth making would require additional legal work by the opponent in the future, so leave to amend would never be granted if that were cognizable prejudice." *Rosati v. Bekhor*, No. CC-06-1160-MoDT, 2007 Bankr. LEXIS 4821, at *31 (Bankr. 9th Cir. March 10, 2007); *see also Stearns v. Select Comfort Retail Corp.*, 763 F. Supp. 2d 1128, 1158 (N.D. Cal. 2010) ("To overcome Rule 15(a)'s liberal policy with respect to the amendment of pleadings a showing of prejudice must be *substantial*. Neither delay resulting from the proposed amendment nor the prospect of additional discovery needed by the non-moving party in itself constitutes a sufficient showing of prejudice."); *Securities & Exchange Comm'n. v. Glick*, No. Civ.-LV-78-11, 1980 U.S. Dist. LEXIS 12141, at *7 (D. Nev. June 12, 1980) ("[T]he fact that Glick may have to engage in additional discovery which will be time consuming or expensive does not constitute the type of prejudice that would justify a denial of the motion to amend."). It is only when a proposed amendment would require parties to engage in

[6] PadMapper's separate argument that it would have devoted additional resources had it known of craigslist's new claims is meritless. PadMapper's counsel barely participated in any of the 19 depositions of the 3taps and craigslist witnesses taken during fact discovery, relied on the 3taps Defendants' experts (having not retained any experts of its own during fact discovery), and took a backseat to the 3taps Defendants in nearly all of the discovery disputes between the parties.

"substantial" additional discovery that a party may be prejudiced. *See Kelly v. Applera Corp.*, No. C-07-3002 MMC, 2008 WL 901670, at *1 (N.D. Cal. Mar. 31, 2008) (finding prejudice where an amendment would require the parties "to engage in a substantial amount of additional discovery").

Here, *no* additional discovery will be needed as a result of craigslist's proposed amendments, let alone the *substantial* amount necessary to support a finding of *substantial* prejudice.

**3. The Potential For Increased Liability Is An Insufficient Reason To Deny Leave to Amend**

The TAC includes a vicarious liability claim against the 3taps Defendants based on their involvement in the infringing activities of Mr. Niessen and the other individuals or entities employed by the 3taps Defendants to scrape copyrighted content from the craigslist website. The 3taps Defendants correctly point out that the proposed addition of this vicarious copyright infringement claim exposes them to increased liability. But that is no reason to deny leave to amend.[7] *See Rosati*, 2007 Bankr. LEXIS 4821, at *23 ("Any amendment to a complaint is prejudicial in some sense, because any amendment worth making increases potential liability, but that is not typically a ground for denying leave to amend."), citing C. Wright, A. Miller & M. Kane, 6 Fed. Practice & Proc. Civ. 2d § 1487, text accompanying n.13.

**C. Defendants Fail To Demonstrate Any Undue Delay**

**1. craigslist's Vicarious Copyright Infringement Claim Is Based On Newly Discovered Facts**

craigslist proposed to add the derivative copyright infringement claim against the 3taps

[7] The 3taps Defendants suggest – with no specific factual support – that they would have "allocated resources" differently had they known of the derivative copyright claim. (3taps Opp. at p. 10.) This bald claim is wholly insufficient to demonstrate the *substantial* prejudice needed to overcome the presumption in favor of granting leave to amend. *See e.g. Segal v. Brachfeld*, No. C -11-05524 EDL, 2012 U.S. Dist. LEXIS 124507, at *6-7 (N.D. Cal. Aug. 31, 2012) (rejecting defendant's argument that it was prejudiced because it "took strategic steps based on the original complaint"). Unless Defendants were prepared to depose *their own* offshore agents, it is unclear what specific discovery Defendants would have undertaken (that it did not already undertake) to combat this claim.

Defendants and Mr. Niessen when it uncovered during discovery the facts necessary to support the claim. While the allegations in the proposed TAC certainly give sufficient notice to Defendants[8] (*see Oppenheimer v. Allvoices, Inc.*, No. C 14-00499, 2014 U.S. Dist. LEXIS 903210, at *37 (N.D. Cal. June 10, 2014) ("[T]he court finds that Plaintiff has alleged sufficient facts to support a plausible claim for vicarious copyright infringement . . ."); *cf. Starr v. Baca*, 652 F.3d 1202, 1212 (9th Cir. 2011) ("[U]nder the federal rules a complaint is required only to give the notice of the claim such that the opposing party may defend himself or herself effectively.")), craigslist is nevertheless happy to detail the additional facts recently uncovered in discovery that establish the extent to which the 3taps Defendants controlled, and benefited from, the conduct of the directly infringing scrapers, including Mr. Niessen. For example:

- On April 28, 2015, Mr. Kidd testified that 3taps paid Mr. Niessen pursuant to an agreement and directed Niessen to change the way the data was acquired after this court's ruling on the 3taps Defendants' Motion to Dismiss. (Ellison Decl. ¶ 8, Ex. C, pp. 89-90.)
- On March 26, 2015, Meg Nakamura, 3taps' co-founder and Chief Operating Officer, testified that Mr. Niessen was 3taps' "main source of user content on craigslist" for several years. (Ellison Decl., ¶ 9, Ex. D, p. 83.)
- Ms. Nakamura further testified that Mr. Niessen "played a bunch of roles" at 3taps, characterizing him as "very similar" to a "provisional CTO" and a member of the 3taps management team. (*Id.*, pp. 88-92.) She also testified that she worked with Mr. Niessen on a daily basis from 2009 through 2013. (*Id.*, p. 95.)

[8] craigslist alleges, *inter alia*, that "craigslist content scraped on behalf of 3taps can be traced directly to Mr. Niessen," (TAC, ¶ 98); that "Mr. Kidd directed one of his scraping agents, Mr. Niessen, 'to keep going' on a plan to amass so many IP address proxies that it would be difficult for craigslist to detect the scraping" (TAC, ¶ 163); that Kidd "personally, and at his sole direction, attempted to either hire or otherwise encourage a 'crowd' of scrapers to obtain craigslist content for him . . . ," (TAC, ¶ 164) (emphasis added); that Kidd informed various direct infringers that 3taps would "provide the foundation software that a third party can run if they want to be a distributed or crowdsourcing grabber" and would "spot ya all the money to get going and then pay a profit margin on top of costs to make it worth your while," (TAC, ¶ 165); and that "Mr. Kidd directed and encouraged [scraping] activities with the knowledge that such activities are unlawful and violated craigslist's TOU." (TAC, ¶ 167; *see also* TAC, ¶¶ 262-272.)

- On or around February 7, 2015, 3taps produced an email from Ms. Nakamura[9] to 3taps' Ukrainian scrapers in which Ms. Nakamura demanded that they "no longer hit[ ] CL directly" and established 3taps' "expectations for data volumes." (Ellison Decl., ¶ 10, Ex. E.)

These facts, and others, were discovered by craigslist at the end of the discovery period, thus spawning the present request for leave to amend to include craigslist's vicarious copyright infringement claim against the 3taps Defendants.

**2. craigslist's Contributory Copyright Infringement Claim, and Civil Conspiracy Allegations, are Based On Newly Discovered Facts**

Similarly craigslist also moved expeditiously to add allegations to support its claim for contributory copyright infringement against PadMapper and Mr. Niessen and civil conspiracy allegations against PadMapper (Motion at p. 7), when the relevant facts came to light during discovery. The relevant allegations in the TAC, which are pled in sufficient detail to satisfy Rule 8, are supported by the following facts recently uncovered by craigslist during discovery:

- PadMapper stopped scraping craigslist directly because Eric DeMenthon, its founder and CEO, was concerned about the legality and, as a result, decided to obtain craigslist's content directly from 3taps. (Ellison Decl. ¶ 11, Ex. F, pp. 231-32.)
- PadMapper knew that craigslist did not permit scraping on its website by PadMapper or 3taps and that craigslist was blocking 3taps, but nevertheless continued acquiring all of its craigslist content from 3taps. (*Id*., pp. 243-47.)
- PadMapper paid thousands of dollars to acquire craigslist's content from 3taps and 3taps has been the sole source of craigslist content on PadMapper's website since July 9, 2012 (Ellison Decl., ¶ 12, Ex. G, Response Nos. 7 and 9.) PadMapper is historically one of only three sources of revenue for 3taps. (*Id*., ¶ 13, Ex. H, p. 141.)
- 3taps made improvements to their services in response to PadMapper's input and requests. (Ellison Decl., ¶ 11, Ex. F, pp. 295, 298-99.)

[9] Ms. Nakamura sent the email "from [her] personal email account because everything in the 3taps email might become available to the lawyers for our lawsuit." (Ellison Decl., ¶ 10, Ex. E.)

- Mr. DeMenthon has extensive knowledge of the 3taps API which he has acquired from years of collaborating with and relying on 3taps. (*See, e.g., Id.*, pp. 261-67.)

PadMapper's effort to prevent craigslist from testing its contributory copyright and conspiracy allegations on the merits on the basis that craigslist uncovered this information close to the discovery cut-off should be rejected.[10]

3. **Delay Alone Is An Insufficient Basis For Denying Leave To Amend**

Even assuming, for the sake of argument, that craigslist's proposed derivative copyright claims could theoretically have been included in its prior complaint, that alone would not provide a sufficient basis for denying leave to amend to add those claims. The Supreme Court has unequivocally stated that, absent extraordinary circumstances, a plaintiff "ought to be afforded an opportunity to [amend its complaint and] test [its] claim[s] on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In accordance with this principle, the Ninth Circuit has recognized that "[t]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining his defense upon the merits." *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980), citing C. Wright and A. Miller, Federal Practice & Procedure § 1219 at 145.

craigslist's new claims are viable and should be decided on the merits. Indeed, the emails attached as exhibits to the Declaration of Venkat Balasubramani plainly demonstrate that craigslist's claims for contributory copyright infringement and conspiracy against PadMapper have merit, as the emails reveal that the relationship between PadMapper and 3taps was more than merely that of buyer and seller; to the contrary, PadMapper was substantially involved in both the decision to scrape and the process of scraping data from craigslist. (*See e.g.*, Balasubramani Decl., Exs. C-F.) Thus, even if the Court were to accept Defendants' mischaracterizations of craigslist's amendments as claims that could have been brought earlier in

[10] craigslist deposed Mr. DeMenthon on March 18, 2015 and PadMapper served its Objections and Responses to craigslist's Second Set of Interrogatories on April 7, 2015.

the action, craigslist should nonetheless be granted leave to amend.

**D. Defendants Fail To Demonstrate craigslist's Amendments Are Futile**

**1. craigslist's Theory of Trespass Harm Is Viable**

Defendants' argue that craigslist's proposed revision to Paragraph 193 to clarify the specific sub-species of trespass harm on which craigslist's trespass claim is based would be "futile." To be "futile," a proposed amendment must "clearly be subject to dismissal." *Hip Hop Beverage Corp. v. RIC Representacoes Importacaco e Comercio Ltda*, 220 F.R.D. 614, 622-23 (C.D. Cal. 2003) (quoting *DCD Progs., Ltd.*, 833 F.2d at 188). Applying this standard, craigslist's proposed revision is far from futile, for at least the following reasons:

***First***, the so-called "pile-on effect" theory of trespass harm is an accepted form of trespass harm that has been accepted by federal courts (including in this district) for more than a decade. *See, e.g.*, *eBay*, 100 F. Supp. 2d at 1066 ("If BE's activity is allowed to continue unchecked, it would encourage other auction aggregators to engage in similar recursive searching of the eBay system such that eBay would suffer irreparable harm from reduced system performance, system unavailability, or data losses."); *Register.com, Inc. v. Verio, Inc.*, 126 F. Supp. 2d 238, 249-51 (SDNY 2000) (granting injunction despite inability to measure the burden the scraping had placed on plaintiff's system, because "if Verio's [scraping] were determined to be lawful, then every purveyor of Internet-based services would engage in similar conduct" and thus plaintiff had a legitimate fear "that its servers will be flooded by search robots"); *cf. Ticketmaster Corp. v. Tickets.com, Inc.*, No. CV99-7654-HLH (BQRx), 2000 U.S. Dist. LEXIS 12987, at *17 (C.D. Cal. Aug. 10, 2000) (finding insufficient evidence of harm to chattel to constitute actionable trespass to chattels, finding the effect of the scraping to be "very small" and distinguishing eBay because "nor here is the specter of dozens or more parasites joining the fray, the cumulative total of which could affect the operation of [plaintiff's] business.").[11]

***Second***, Judge Corley has already ruled that craigslist is entitled to pursue this theory of trespass harm and indicated that the theory is supported by *Intel Corp. v. Hamidi*, 30 Cal. 4th

[11] Defendants' arguments regarding the merits of craigslist's theory of trespass harm appear to constitute an improper attempt to get advance rulings on their summary judgment arguments.

1342, 1353-54 (2003). (*See* Section II.A.)

2. **craigslist Adequately Alleges Derivative Copyright Infringement Claims And Civil Conspiracy**

Likewise, craigslist should be entitled to test its claims on the merits and the adequacy of its proposed additional allegations is not properly determined at the motion for leave to amend stage. *See Hip Hop Beverage*, 220 F.R.D. at 622-23; *Harris v. Rand*, 682 F.3d 846, 850 (9th Cir. 2012). In any event, as explained above in Sections II.A, II.C.1, and II.C.2, craigslist adequately alleges its proposed claims for derivative copyright infringement and civil conspiracy. craigslist also uncovered extensive facts during discovery that form the basis for its new claims and that it will offer (on summary judgment and/or at trial) to support the proposed additional allegations in the TAC. (*See* Sections II.A.1; II.C.1; II.C.2.) Accordingly, craigslist's proposed amendments regarding secondary copyright liability and civil conspiracy are not futile.

## III. CONCLUSION

For the foregoing reasons, and those set forth in the Motion, craigslist respectfully requests that the Court grant craigslist leave to amend its operative complaint, in the manner reflected in the proposed TAC submitted as Exhibit 1 to the Motion.

Dated: May 21, 2015

LATHAM & WATKINS LLP

By: /s/ *Perry J. Viscounty*
Perry J. Viscounty
Jennifer L. Barry

Attorneys for Plaintiff
CRAIGSLIST, INC.